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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

TDC MANAGEMENT CORPORATION, INC.
and T. CONRAD MONTS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

Petitioners won a judgment against the United States rendered by the Department of Transportation ("DOT") Board of Contract Appeals ("the Board"). Later, the United States was granted a summary judgment against petitioners for $1.2 million under the False Claims Act, based on the collateral estoppel effect of certain alleged findings of fact in the Board Opinion *even though petitioners had won the case before the Board and thus could not contest such findings.* The circuit court held that such reliance upon collateral estoppel was "clear legal error by the district court." But, the court declined to reverse solely because the petitioners did not object in the trial court, holding that it could ignore the failure to object below only if "the result would be a plain miscarriage of justice." The questions presented, therefore, are:

1. Whether the decision below conflicts with decisions of other circuits and of this Court because it erroneously held that a controlling issue of collateral estoppel law, clearly wrongly decided by, but not raised in the trial court, could be reversed on appeal only if there were "a manifest injustice"?

2. Should not this Court exercise its supervisory power to correct a "clear manifest injustice" imposed by the court below at the request of, and for the sole benefit of, the federal government against one of its citizens?

LIST OF PARTIES

The parties to the proceeding below were:

The United States of America, Plaintiff-Appellee;

TDC Management Corporation, Defendant-Appellant; and

T. Conrad Monts, Defendant-Appellant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, petitioner TDC Management Corporation, Inc. ("TDC") hereby states as follows:

1. TDC has no parent corporation(s); and

2. No publicly held company owns 10% or more of TDC's stock.

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Petitioners, TDC Management Corporation ("TDC") and T. Conrad Monts ("Monts") respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 3, 2002, a timely petition for rehearing denied on July 5, 2002. The issue on which review is sought is in plain and irreconcilable conflict with cases in other federal circuits and opinions of this Court.

OPINIONS BELOW

On May 3, 2002, the District of Columbia Circuit issued the opinion (Appendix "App." 1a - 15a) from which this petition is brought. That opinion is now reported as United States v. TDC Management Corp., 288 F.3d 421 (D.C.Cir. 2002). The July 5, 2002 Order of the District of Columbia Circuit denying rehearing of that judgment on July 5, 2002. (App. 16a) is unreported. An earlier decision by the District of Columbia Circuit on a prior appeal in this case is reported at 24 F.3d 292 (D.C.Cir. 1994).

JURISDICTION

The final judgment of the District of Columbia Circuit affirming the erroneous summary judgment entered against petitioners[1] by the district court was issued on May 3, 2002. A timely petition for rehearing of that decision was denied on July 5, 2002. See App. 16a. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the decision below. This petition is timely under Supreme Court Rule 13.3.

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[1] There is some question whether the judgment entered against Monts personally is valid. See App. 14a.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "No person shall be . . . deprived of . . . property, without due process of law."

STATEMENT OF THE CASE

This petition presents a simple, but extremely important, recurring, question of appellate procedure, with significant constitutional overtones. The question is under what circumstances, if any, a federal court of appeals can simply refuse to reverse an admittedly erroneous summary judgment granted to its coordinate branch of Government, the Executive Branch. In this case, the District of Columbia Circuit refused to correct such an admittedly erroneous judgment on the ground that the purely legal issue – *which the court actually decided should have prevented the granting of summary judgment as a matter of law* – was not first raised in the district court. We are aware of no other court which has ever reached a similar holding, after actually deciding that such a clear and fundamental legal error had been made in a case. To the contrary, the other federal circuit courts of appeal, following the guidance of this Court, would plainly have reversed the summary judgment below precisely because the impediment to its propriety was such a clear issue of law, beyond any doubt as to its proper resolution, and has implications that it violates the Fifth Amendment.

Prior Proceedings

This case turns on the purported collateral estoppel effect of certain alleged findings made in the proceeding before the DOT Board — a proceeding in which petitioners were the prevailing parties. TDC, a small business entity, had entered into a best-efforts cost-reimbursement contract with the DOT to devise and implement a bonding program for minority contractors (the "Program"). *See* App. 2a. The DOT eventually terminated the contract for convenience before TDC could complete implementation of the Program, and it denied TDC reimbursement of certain costs. TDC asked the Board to review the DOT's denial of reimbursement, which led to a full trial on the merits before the Board. *Id.*

The most important issue before the Board was whether TDC was at fault for the failure of the Bonding Program, or whether that failure was attributable to the DOT's termination of the contract. In a lengthy opinion, the Board concluded that the DOT, rather than TDC, should bear the blame for the Program's failure. According to the Board, the "dispositive factor" in the case was the fact that there was "no evidence in the record that the Program failed for any reason other than [the DOT] electing not to fund the balance of the contract, but to terminate TDC's performance." App. 5a (quoting Board Opinion at 133). Because the Program's failure was attributable solely to the Government, the Board held that most of TDC's asserted costs were reimbursable.

In making its determination regarding the cause of the Program's failure, the Board also considered the Government's claim that TDC allegedly omitted certain facts from the progress reports it submitted to the Department along with its requests for reimbursement. *See* App. 3a.

Ultimately, however, any Board's findings with regard to the alleged omissions played no part in the Board's ultimate determination in Petitioners' favor.

On the strength of the Board's opinion, TDC sought summary judgment in a False Claims Act suit that the Government had brought in tandem with the Board appeal. App. 3a. The district court granted TDC's motion, based on the collateral estoppel effect of the Board's holding in TDC's favor. The District of Columbia Circuit affirmed in part and reversed in part, holding that, while the district court was correct about the collateral estoppel effect of the Board's findings with respect to affirmative misrepresentations made by TDC in its progress reports, the same could not be said about the alleged omissions, and it remanded for further proceedings. *See id.*; *see also United States v. TDC Management Corp.*, 24 F.3d 292, 296 (D.C. Cir. 1994).

The "clear error by the district court" identified in the court below, App. 5a, arose after such remand. On remand, the Government sought summary judgment on the basis of the Board's statements in the Board's opinion with respect to the alleged omissions, arguing that *the Government* was now entitled to reap the benefits of collateral estoppel, even though it did not prevail before the Board. The Government claimed that the Board's findings with respect to TDC's alleged omissions were entitled to collateral estoppel effect; the district court agreed and granted the Government's motion. App. 4a.

With the aid of new counsel, because former counsel – a sole practitioner – had died, petitioners raised a new legal argument for the first time on appeal. The new argument was that collateral estoppel was completely inapplicable to the facts given dispositive weight by the district court, because petitioners had actually prevailed in

the prior proceeding at which those facts were adduced and therefore had no ability to contest those findings. It is blackletter law that such findings, which are contrary to the actual holding of a case in a party's favor, "have long been accepted as paradigms of the unnecessary conclusions that are not preclusive in later litigation." 18 Wright, Miller & Cooper, Federal Practice And Procedure, Section 4421 at 199 (1981); accord, Fletcher v. Atex, Inc., 68 F.3d 1451, 1458 (2d Cir. 1995); Balcom v. Lynn Ladder and Scaffolding Co., 806 F.2d 1127, 1127 (1st Cir. 1986); Fireman's Fund Ins. Co. v. International Market Place, 773 F.2d 1068, 1069-70 (9th Cir. 1985). Easily recognizing the teaching of this blackletter law, the District of Columbia Circuit clearly and explicitly acknowledged that petitioners' new strictly legal argument was correct. Indeed, the circuit court found that the district court committed a "clear legal error" in employing the doctrine of collateral estoppel to grant summary judgment against the petitioners, on the basis of a prior proceeding which the petitioners had actually won. App. 5a.

The District of Columbia Circuit, however, refused to reverse the summary judgment on that ground for a reason contrary to, and in conflict with, established case law. It said it could accept the new argument of law only if failure to do so would be a great manifest injustice. The circuit court's failure to exercise its discretion here thus was flatly contrary to precedent of this Court and the settled law in the other Circuits, and presents a question of exceptional importance for this Court to resolve. The court's refusal to reverse the erroneous holding below on the basis of petitioners' argument that is correct as a matter of law implicates an overarching concern about the integrity of judicial review in general: when a district court has made such a clear error of law that it can be determined with ease and with unanimity by three circuit judges, and when that

clear error of law was the dispositive factor in denying petitioners' fundamental right to a trial on serious charges brought by the Government, are not the federal courts required to exercise their discretion to get it right? And is not the imposition of damages over 1.2 million dollars a gross manifest injustice in such circumstances?

REASONS FOR GRANTING THE WRIT

The distinguishing factor in this case is that the circuit court below expressly recognized that the petitioners' new, strictly legal argument identified a "clear error by the district court." App. 5a. But the District of Columbia Circuit declined to reverse the judgment below, however, because it misconstrued the applicable precedents of this Court and conflicting decisions from other circuits as well concerning its power, duty, and requirement to do so. These precedents set forth the established factors that are to control the exercise of a court's discretion to entertain and decide new arguments raised for the first time on appeal. Under these factors, petitioners' new legal argument unquestionably required the court below to exercise its discretion in their favor.

I. The Decision Below Is Inconsistent With Authority of This Court and Conflicts With the Holdings of Other Circuits.

In this case, the District of Columbia Circuit took an erroneous view of its authority to entertain and decide a new issue of law presented for the first time on appeal. In that court's view, it could exercise its discretion to decide such an issue only when necessary to prevent "a manifest injustice." App. 9a. The caselaw, however, establishes a different set of criteria and clearly shows that the Panel's refusal to exercise its discretion here conflicted

with all established precedent. As this Court has previously explained, "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt *or* where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (emphasis added; citations omitted); *see also Hormel v. Helvering*, 312 U.S. 552, 555-59 (1941). The *disjunctive* in this Court's statement clearly demonstrates that "injustice" is not the only mandatory requirement for entertaining a new, strictly legal argument on appeal — which makes sense, because all federal courts also have a fundamental obligation to see that the law is applied correctly to the parties who come before them. Yet here the court concededly failed to fulfill the latter obligation, by refusing to reverse a summary judgment which it found to be based on an undoubtedly flawed legal premise.

Other circuit courts of appeal furthermore have repeatedly recognized that "manifest injustice" is not the only situation in which the court must entertain a new, strictly legal argument on appeal. An equally clear situation is where the error overlooked is a clear error of law. *See, e.g., National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995) (applying multi-factor test to determine whether "extraordinary circumstances" exist); *Austin v. Healey*, 5 F.3d 598, 601 (2d Cir. 1993) (noting only that new argument raises pure question of law and implicates separation of powers doctrine); *Pennsylvania Environmental Defense Foundation v. Canon-McMillan School District*, 152 F.3d 228, 234 (3d Cir. 1998) (noting that court of appeals may reverse district court's "clear deviation from an established legal rule," even if objection not preserved); *Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992) (noting that court of appeals may entertain new argument "where the proper resolution is beyond any doubt" and where "the errors

or omissions are obvious, unfair or undermine the integrity or public confidence of judicial proceedings"); *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980) (asking only whether new argument involves solely a question of law that does not rely on factual record and whether proper resolution of question is beyond any doubt).

Under any reasoned application of the traditional factors, the present case clearly constitutes an "exceptional" situation in which the court's discretion should have been exercised. First, it was a clear error of law. Second, because the district court's judgment admittedly rests on a "clear error" of law, it would be manifestly unjust to allow the $1.2 million judgment against petitioners to stand. *See Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (in considering legal issue raised for first time on appeal and reversing award of punitive damages, court of appeals notes that "there can be no question that any error that costs a party $300,000.00 dollars [*sic*] is 'so fundamental as to result in a miscarriage of justice'"). Third, the United States Government should not be permitted to prevail against one of its citizens in such an unfair way. *See*, Fifth Amendment.

Even putting aside the dollar value of the judgment, this case is exceptional for two additional reasons. *First*, the Panel agreed that the Petitioners' new argument was correct and that there was "obvious" legal error by the district court. App.9a. The fact that the court below did so demonstrates that the legal issue raised by Petitioners' new argument is highly exceptional. *Second*, this is not a typical case of waiver. Although Petitioners may not have, in the view of the court below, raised the collateral estoppel issue squarely in the district court, it was clearly present throughout. Most importantly, the issue was part of the

lower court's first opinion in this case, which held that the collateral estoppel treatment of the alleged omissions was different from that of the affirmative misrepresentations. *See*, 24 F.3d at 296. The "law of the case" implications from the court of appeals' prior opinion should plainly have put both the Government and the district court on notice of the "clear error" in the positions they took concerning collateral estoppel below.

All things considered, this is plainly a case in which the Panel was required to exercise its discretion to accept as dispositive petitioner's new argument, because such new argument satisfies the factors this Court and all circuits who have considered the issue have adopted as requirements for the exercise of discretion. Like the issues in *Roosevelt* and the other cases discussed above, the petitioners' new issue in the court below was purely a question of law and it needed no additional factual development. Moreover, the issue had been fully briefed below by both parties. And because the Panel Opinion itself agreed that the petitioners' legal position was the correct one, the proper resolution of the issue was "beyond any doubt" (*Railroad Yardmasters*, 721 F.2d at 1337). Finally, petitioners did not intentionally omit the argument in the district court as a matter of trial strategy; any omission of the argument in the court below was entirely inadvertent. Petitioners were represented by other counsel in the summary judgment proceedings in the district court and the petitioners' "belated tender" of their collateral estoppel argument in the court below "[was] the product of a change in counsel . . . rather than a change in tactics." *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 629 n.7 (1st Cir. 1995) (exercising discretion to decide legal question raised for first time on appeal, in part because failure to raise question below was inadvertent). In short, all of these factors weighed strongly in favor of demanding

entertainment of petitioners' argument on appeal in the court below.

In deciding whether to exercise its discretion, the District of Columbia Circuit completely ignored the standard factors for deciding whether a new legal argument was appropriate for resolution in the court of appeals which would have required a decision in petitioners' favor as a matter of law but instead considered two new factors that have never been recognized before, and a third — the question of potential prejudice — that necessarily required a "factual" determination for resolution. The three factors employed by the Panel to support its decision were: (1) that TDC and Mr. Monts were culpable for the False Claims Act violations based on alleged omissions from the progress reports; (2) that the Government would suffer prejudice if the court were to entertain this argument because of the death of a certain witness; and (3) the fact that TDC recovered its contract costs in the Board proceedings. App. 9a-11a. Petitioners have been unable to find any authority suggesting that (1) and (3) are appropriate factors for controlling a court's discretion, and the Panel cited none.[2] Thus, the only

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[2] Ironically, the second factor of potential "prejudice" to the Government relied upon by the court below was itself a new argument raised for the first time on appeal – by the Government – and yet it was one which the circuit court apparently felt itself able to decide despite the obvious "factual" component thereof (not in the record), despite the fact that petitioners were not provided with any opportunity to provide briefing on this issue, to present their own evidence, or to test the Government's evidence on this point. Nonetheless, on the basis of approximately two minutes worth of oral argument time alone, the Panel found that "there would be *obvious* prejudice to the government at a trial" due to a witness's death, (App.10a (emphasis added)). The relevant case law calls into question any automatic deference to the Government's assertion of prejudice; to the contrary, it is hornbook law that prejudice is never presumed – even in the case of a witness who has died – and that actual prejudice must be established as a matter of fact. *See, e.g., United States v. Hunter*, 197 F.3d 862 (7th Cir. 1999); *Bennett v. Lockhart*, 39

conclusion that can be drawn from this is that the court below's discretion was not guided by the precedents of this Court or any of its sister circuits — contrary to the centuries-old precept that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *United States v. Burr*, 25 F.Cas. No. 14,692d, pp.30, 35 (CC Va. 1807) (Marshall, C.J.)). The fact that a court has discretion "hardly means that it is unfettered by meaningful standards," *id.*, and the court may not apply a standard that "varies like the Chancellor's foot." *Id.* at 417. Because the court below failed to employ the correct "meaningful standards" in this case, it also failed to recognize that the new strictly legal argument before it was squarely *within* the area of the court's duty to consider and decide. In refusing to exercise that required discretion, the District of Columbia Circuit plainly rejected prevailing authority.

CONCLUSION

This case is "exceptional" for many reasons. Petitioners have been unable to discover *any* reported case in which a federal court of appeals has actually found that a dispositive legal argument raised for the first time on appeal was correct, but then declined to apply that finding to reverse the erroneous judgment below. This is undoubtedly because it makes no systemic sense for a court to do so. Having decided the issue, the appellate court should plainly apply that decision to the case before it in order to avoid breeding disrespect for the law's perceived preference for procedural technicalities over substance. Petitioners submit that for the

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F.3d 848 (8th Cir. 1994); *United States v. Butz*, 982 F.2d 1378 (9th Cir. 1993).

circuit court to let stand a judgment after finding the legal underpinnings of that judgment to have been "clear error" is itself a manifest injustice of a kind that would "undermine the integrity or public confidence of judicial proceedings." *Brown v. Crowe*, 963 F.2d 895, 898 (6th Cir. 1992).

In the absence of a "plain error" rule for civil cases in the federal system, the circuit courts of appeal have been left – under this Court's guidance - to establish the procedural ground rules for when a new legal issue can and cannot be decided on appeal. Obviously, it is important that the procedure in this regard be uniform around the country, lest litigants find themselves subject to varying results dependent upon the geographical location of their case. Under the established criteria for determining when an appellate court should consider and is required to decide a new legal issue raised for the first time on appeal, this is also an "exceptional" case in which the petitioners should have the advantage of a rule which is blackletter law..

Surely the supervisory power of this Court to see that fundamental justice is done to a citizen, particularly where the United States Government is on the other side of the case and will be the sole beneficiary of its ill-founded result, is sufficient to warrant this Court's review of the decision below. This Court should now take the final step in this case of ordering the court below to reverse the summary judgment against petitioners because of the patently improper application of collateral estoppel, admitted by the court below, that underlies such judgment.

For the foregoing reasons, the petition for writ of certiorari should be granted to ensure conformity among

the circuits on the issues of fundamental fairness raised herein.

Respectfully submitted,

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Dated: October 3, 2002

**UNITED STATES OF AMERICA, Appellee,
vs. TDC MANAGEMENT CORPORATION, INC. AND
T. CONRAD MONTS, Appellants.**

No. 01-5150
United States Court of Appeals, District of Columbia Circuit.

Argued March 8, 2002.
Decided May 3, 2002.

Before: GINSBURG, Chief Judge,
ROGERS and GARLAND, Circuit Judges.
Opinion for the Court filed by Circuit Judge Rogers.

ROGERS, Circuit Judge:

This case is before the court for a second time. In the first appeal, the court reversed in part the grant of summary judgment to TDC Management Corporation, Inc. and its president T. Conrad Monts. The court held that the decision of the Department of Transportation Board of Contract Appeals ("the Board") on TDC's appeal from cost disallowances collaterally estopped the government from relitigating the accuracy of TDC's monthly progress and expenditure reports, but did not estop the government from bringing False Claims Act charges based on information that was omitted from those reports. *United States v. TDC Mgmt. Corp.*, 24 F.3d 292 (D.C. Cir. 1994) ("TDC I"). In this second appeal, from the grant of summary judgment to the government, TDC contends correctly that the district court erred by granting preclusive effect to factual findings by the Board. This contention is waived, however, because TDC did not raise it in the district court and no occasion is presented for the exercise of our discretionary review in order to prevent a manifest injustice. Accordingly, because TDC's other challenges are unpersuasive, we affirm.

I.

The background to this appeal appears in *TDC I*. Suffice to say, the litigation arose in connection with a Demonstration Bonding Program ("Program") of the Urban Mass Transit Authority ("UMTA") of the Department of Transportation. The Program was designed to assist minority enterprises in securing bonding from sureties when bidding in large transportation construction projects. *TDC* I, 24 F.3d at 294. TDC agreed to identify private investors willing to provide collateral and management assistance to the minority enterprises in return for a share of the profits; for its part, UMTA agreed to match the collateral that investors provided. *Id.* By the terms of the Program, TDC was to serve as ombudsman between the parties, with no financial interest in Program operations. *Id.* On July 6, 1983, TDC and UMTA entered into a cost-reimbursement contract in which TDC was to use its "best efforts" to locate investors and sureties and obtain their tentative agreement to participate in the Program. *Id.* at 296.

When the Program failed to progress as expected, UMTA terminated the contract for convenience and disallowed nearly half of TDC's claimed contract-related expenses, which totaled $928,916. *Id.* at 296. TDC appealed to the Board. Before the Board rendered its decision, the United States in May 1989 sued TDC under the False Claims Act, 31 U.S.C. § 729 (1982), for misrepresenting its actual progress in its monthly reports to UMTA and concealing deviations from the Program terms. *Id.* The Board ruled in TDC's favor and reversed the disallowances, finding that TDC had not breached the contract for nonperformance and that it's monthly reports had notified UMTA of the categories and types of expenses that UMTA sought to disallow. *Id.* Viewing its jurisdiction under the Contract Dispute Act, 41 U.S.C. § 605, as limited to the costs that had been disallowed by the contracting

officer, the Board declined to consider UMTA's claim that TDC was not entitled to any monies under the contract due to fraudulent omissions. *Id.* at 295. The Board's decision was affirmed by the United States Court of Appeals for the Federal Circuit. *Skinner v. TDC Mgmt. Corp.*, 975 F.2d 869 (Fed.Cir. 1992) (unpublished order).

Based on the collateral estoppel effect of the Board's findings, TDC moved on April 19, 1991, for summary judgment on the False Claims Act charges. *TDC I*, 24 F.3d at 294. The district court granted the motion on August 17, 1992. Following a partial reversal by this court in *TDC I* on June 3, 1994, the district court on remand granted the government's motion for summary judgment on March 29, 2000, and on February 6, 2001, awarded the government damages. On April 10, 2001, the district court denied TDC's motion and granted the government's cross-motion, pursuant to Fed.R.Civ.P. 60, to clarify or correct the judgment.

II.

On appeal, TDC challenges the grant of summary judgment on several grounds only one of which requires extended discussion. That contention is that the district court relied on an erroneous application of the doctrine of collateral estoppel.

A.

On remand, the district court ruled that collateral estoppel prevented TDC from relitigating factual issues decided by the Board with regard to omissions in TDC's monthly reports because "the issue of omissions was squarely addressed by the Board in its prior review of the contract termination." *Remand Opinion* at 7. Relying on the Board's findings, the district court concluded there were no genuine issues of fact with regard to alleged omissions. *Id at*

14. The district court recited at length the Board's findings that TDC had departed from the terms of the Program by, *inter alia*: (1) planning to use interest generated by short-term investment of the UMTA contribution to underwrite the costs of providing services to disadvantaged business enterprises; (2) proposing to investors that such businesses be charged a 3% fee for management services; and (3) intentionally failing to disclose to UMTA its plans to hold a financial stake in Program operations in order to keep UMTA from learning of activities that it would insist be terminated; and that such investment TDC could no longer act objectively as ombudsman for the Program. On the basis of the Board's findings, the district court concluded that the omissions were either intentional or resulted from reckless disregard of the Program terms, causing monthly reports submitted by TDC in support of its invoices for payment to be false. In granting summary judgment to the government on liability, the district court also relied on the unrebutted declarations of UMTA officials, including that of UMTA Administrator Ralph L. Stanley stating that had he known that TDC or Monts tried to obtain an equity stake or other financial interest in the Program, he would have directed that the contract be immediately terminated for cause. The district court thus found that the omissions were material because had UMTA known of the omitted information, it would have either required TDC to cease those activities or terminated the contract for cause. *Id.* at 15.

[1] In *TDC I*, this court explained that a party is not collaterally estopped from relitigating a disputed issue of fact unless that issue "was actually litigated and necessarily decided by a final disposition on the merits." 24 F.3d at 295; *see also Nasem v. Brown*, 595 F.2d 801, 805 (D.C. Cir. 1979); 18 CHARLES ALAN WRIGHT & ARTHUR R. FEDERAL MILLER, PRACTICE AND PROCEDURE § 4421 (1981); *id.* § 4475 at 764-70. Or, as stated in the RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); a prior determination can only

preclude relitigation of the same issue if it was "essential to the [prior] judgment." TDC prevailed before the Board and was awarded $778,613 for expenses incurred under the contract. *TDC I*, 24 F.3d at 294. The Board found that "[t]here [was] no evidence in the record that the Program failed for any reason other than [UMTA] electing not to fund the balance of the contract, but to terminate TDC's performance." *Board Opinion* at 133. Thus, TDC maintains, the Board's findings regarding the omissions in TDC's progress reports were not necessary to the result that the Board ultimately reached, and a factual finding by the Board that is adverse to the prevailing party cannot be "essential to the judgment" because by definition it could not have affected the outcome of the case. TDC contends, therefore, that in considering TDC to be bound by the Board's findings regarding the omissions, the district court plainly erred.

In *TDC I*, this court stated that the Board "expressly reserved for the district court the legal determination of whether TDC's failure to report its financial stake in Program operations constituted fraud," and that "[i]n disposing of TDC's contract claim, the Board made no necessary findings about UMTA's reliance on TDC's reports." *TDC I*, 24 F.3d at 296. Notwithstanding the instruction in *TDC I* and what TDC now correctly contends is clear error by the district court, TDC did not alert the district court to its error. On remand, TDC never argued that it should not be precluded from relitigating UMTA's reliance on the omissions because those findings were not necessary to the Board' decision. Rather, as the district court noted, in opposing the government's motion for summary judgment TDC "fail[ed] to address, let alone dispute, the collateral estoppel effect of the [Board's] opinion with regards to omissions from its monthly reports to UMTA. Instead, TDC suggest[ed] that the False Claims Act claim based on omissions [wa]s a new claim which require[d] further

discovery." *Remand Opinion* at 6. Nor in its motion for clarification under Rule 60 did TDC argue that the district court's collateral estoppel ruling as to the omissions was erroneous. On appeal, TDC points to nothing that would indicate that it presented an appropriate objection in the district court. TDC suggests, for example, that in opposing the government's motion for summary judgment, TDC identified several factual issues relating to the omissions that would be inconsistent with the application of collateral estoppel; again, however, the record shows that TDC was addressing the issue of whether TDC's omissions were material, i.e., whether UMTA relied on TDC's monthly reports, and not whether it was appropriate to afford collateral estoppel effect to the Board's findings. To the extent that TDC now focuses on the salient error, it argues that the issue of collateral estoppel *vel non* was placed squarely before the district court in the government's motion for summary judgment. But as the district court's opinion makes clear, this is hardly the same as joining the government's argument on collateral estoppel. TDC itself moved for summary judgment on the basis of the collateral estoppel effect of the Board's findings; further, it argued in opposing the government's calculation of damages that collateral estoppel operated in TDC's favor, on the ground that the Board had already determined the government could not prove that TDC's actions were the proximate cause of the Program's demise. Thus, far from challenging the district court's application of collateral estoppel in its liability determination, TDC's argument reinforced the notion that the district court's invocation of the doctrine was appropriate. TDC's reliance on *Butera v. District of Columbia*, 235 F.3d 637, 645 n. 6 (D.C. Cir. 2001), and *AFGE v. FLRA*, 841 F.2d 1165, 1168 (D.C. Cir. 1988), is misplaced; in *Butera* the court addressed only those issues raised in the district court, and in *AFGE* the court bound the FLRA to the implicit premise of its argument in the district court. Here, by contrast, TDC neither explicitly nor

implicitly raised a "necessity" argument in the district court. We hold that TDC, therefore, has waived the contention that the district court erred in ruling that TDC was precluded from relitigating UMTA's reliance on the omissions in TDC's monthly reports.

B.

[2] The question remains whether this court should exercise its discretion to consider TDC's contention notwithstanding its waiver. In *District of Columbia v. Air Florida*, 750 F.2d 1077 (D.C. Cir. 1984), the court stated the general rule: "It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Id.* at 1084-85. The Supreme Court has long instructed, however, that appellate courts must "not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." *Hormel v. Helvering*, 312 U.S. 552, 558, 61 S.Ct. 391, 719, 722, 85 L.Ed. 1037 (1941). In *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed 555 (1936) the Supreme Court described "exceptional circumstances" when appellate courts on their own motion may, in the public interest, "notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 160, 56 S.Ct. at 392.

> This court thus acknowledged in *Air Florida* that in "exceptional circumstances, where injustice might otherwise result, we have the discretion to consider questions of law that were neither raised below nor passed upon by the District Court." 750 F.2d at 1085. In that case, reviewing dismissal of a complaint for failure to state a cause of action, the court declined to exercise its discretion because to do

so would have engaged the court in deciding whether to create new federal common law where the United States was not a party to the case and Congress may have preempted some or all of the field. *Id.* at 1085-86. On the other hand, In *Mulligan v. Andrews*, 211 F.2d 28 (D.C. Cir. 1954), the court exercised its discretion to depart from the general rule; in that case the loss of the plaintiff's livelihood was at issue due to what he claimed was his unlawful removal from the classified Civil Service, and the court deemed that an "injustice might otherwise result" if the court did not consider whether his employer had failed to comply with the statutory requirement that written reasons be given for his removal. *Id.* at 29.

[3] TDC accordingly asserts in its brief that "[s]omething went horribly wrong here to turn this case upside down from [the] point" where TDC prevailed before the Board, and "it is up to this Court to correct that wrong." Appellant's Br. at 16. In support of its position, TDC makes two arguments why this court should address its collateral estoppel contention: first, the issue is purely a question of law subject to *de novo* review; and second, "the district court's error was plain – if not egregious," as the overwhelming weight of authority demonstrates that collateral estoppel operates in only one direction. Reply Br. at 14. However, these reasons sweep far too broadly and address only some of the relevant considerations. Neither of TDC's arguments necessarily demonstrates that a manifest injustice will occur unless this court addresses the "necessity of the Board's findings to its holding and remands the case for a trial. Although TDC's counsel may have failed to alert the district court to an obvious error, we decline to exercise our discretion for three reasons.

First, culpability. The False Claims Act complaint alleged that TDC's reports overstated its progress and failed to disclose that, contrary to the Program terms, TDC sought to obtain a financial interest in Program operations. *See TDC I*, 24 F.3d at 294. "The withholding of such information – information critical to the decision to pay – is the essence of a false claim." *Ab-Tech Constr., Inc. v. Untied States*, 31 Fed. Cl. 429, 434 (1994). TDC does not contest that certain information was not included in its progress reports and that some of the omitted information would have revealed that TDC was proposing to take an investor position in the Program. TDC thus defrauded the government by presenting reports in support of payment that omitted information indicating that it was acting in a manner that was contrary to the core terms of the Program. Although TDC contends there are material disputed issues regarding, for example, UMTA's failure to make reasonable inquires into TDC's activities, changes that UMTA made to the Program midstream, and the source of the proposals that TDC take equity stakes in the joint ventures with private investors, the record evidence remains dispositive. Likewise, TDC's contention that it could not execute final agreements with investors or sureties because only UMTA had that authority under the terms of the Program is unavailing. TDC sought payment in connection with its efforts to obtain agreements that were contrary to Program terms. The undisputed evidence shows there were omissions that UMTA officials deemed to be material, and TDC presented no evidence to dispute UMTA Administrator Stanley's declaration that he would have immediately terminated the contract had he been aware of TDC's unreported activities.

Second, prejudice to the government. The considerable delay in this litigation creates problems with regard to witnesses' memories and document retention regarding events that occurred almost two decades ago. These problems would presumably affect both parties at a trial. But they are exacerbated for the government, for at oral argument the parties informed the court of the death of Ralph L. Stanley. Stanley's term as UMTA Administrator, from November 21, 1983 to May 31, 1987, spanned the period just after the Program's inception in July 1983 until its termination in April 1985. He was directly in charge of what he described in his April 1996 declaration as a "high priority project," and he claimed in his declaration that he first learned at meetings with Monts and TDC's legal consultant in December 1984 and January 1985 that TDC was deviating from the Program in significant ways. Although other UMTA officials were involved in the management of the Program, Stanley was the person in charge and, due to his death there would be obvious prejudice to the government at a trial.

Third, TDC recovered its contract costs. Pursuant to the Board's decision, TDC recovered $778,613 of the $928,916 that it claimed over the life of the contract as "allowable, allocable, and reasonable" costs associated with its work on the Program. *TDC I*, 24 F.3d at 294; *see Skinner*, 975 F.2d 869. Our holding does not disturb this result. Rather, any False Claims Act damages awarded to the government "would merely offset the payments to which the Board . . . has already determined TDC is entitled under the terms of its UMTA contract." *TDC I*, 24 F.3d at 298. Under the version of the False Claims Act then in effect, the government recovered as damages a civil penalty of $2,000 for each false

claim plus twice the amount of damages sustained as a result of the false claim and costs. 31 U.S.C. § 3729 (1982); *see also TDC I*, 24 F.3d at 298. The district court found that TDC filed 18 false payment vouchers due to material omissions from January 4, 1984, until the Program's termination, and entered judgment against TDC in the amount of $1,285,198.31: doubling the $621,466.11 in vouchers paid by the government plus $36,000 in penalties and $6,266.09 in costs. Hence, although TDC will owe money to the government, it does not face an exacerbated "triple" penalty, i.e., the loss of its contract costs over and above what it owes as damages under the False Claims Act.

In sum, in light of the undisputed record evidence of TDC's culpability, the prejudice to the government, and TDC's recovery of its contract costs, remanding for a trial would simply prolong the closure date of this litigation without, in all likelihood, advancing the interests of either party. Accordingly, we decline to exercise our discretion to address the collateral estoppel contention that TDC waived.

III.

We address briefly TDC's two other contentions, regarding damages and Monts' liability.

A.

[4] TDC contends that in light of the Board's ruling, the government's net damages were zero because it "got what it paid for" under the "best efforts" agreement. TDC further contends that the government failed to prove that TDC proximately

caused its damages because it may have terminated the contract for reasons unrelated to the omissions in the progress reports, and that at the very least, an evidentiary hearing into the causation issue was required. These claims are meritless.

The Supreme Court pointed out long ago that "the chief purpose of the statutes [which formed the basis for the False Claims Act] . . . was to provide for restitution to the government of the money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52, 63 S.Ct. 379, 388, 87 L.Ed 443 (1943). In *United States ex. rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C. Cir. 1995), this court stated that if the government can show it relied on representatives in a contractor's progress reports in deciding to make payments, "those payments may constitute damages under the Act." TDC relies on *United States v. Bornstein*, 423 U.S. 303, 317 n. 13, 96 S.Ct. 523, 531 n. 13, 46 L.Ed.2d 514 (1976), holding that the government is entitled to receive damages "equal to the difference between the market value [of the item] it received and retained, and the market value it would have received if they had been of the specified quality." The Program at issue, however, did not call for TDC to produce a tangible structure or asset of ascertainable value, as occurred in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (1994), and *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966). Rather, the evidence allowed the district court to find that the value of the ""best efforts" provided by TDC was vitiated by TDC's fraudulent concealment of its rent-seeking behavior. Once TDC deviated its

contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court then could properly find that the Program no longer had any value to the government. *Cf. United States ex rel. Compton v. Midwest Specialities, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998).

[5] TDC's contention that the government terminated the contract for convenience and failed to prove that TDC's omissions proximately caused its damages is also unavailing. UMTA initially terminated the contract for convenience but changed this to a termination for cause after learning about the omissions in TDC's progress reports. No court has ever found the termination for cause to be unwarranted. Further, TDC failed to rebut the declarations of UMTA officials that UMTA relied on TDC's monthly reports and would not have continued to make payments on TDC's vouchers but for the omissions. TDC's alternative contention that the district court erroneously characterized the question of materiality by failing to ask whether UMTA officials would have acted differently if the omitted information had been included in the reports, as opposed to whether they knew of such information, was not raised in the district court and is not properly before this court. *See Air Florida*, 750 F.2d at 1084-85. Under the circumstances, there was no genuine issue of fact regarding causation and reliance, nor any need for an evidentiary hearing. Thus, TDC fails to show that the district court erred in adopting a "but for" measure of damages, based on what the government would have paid out had it known of the information that TDC omitted from its monthly progress reports.

B.

[6] Finally, TDC's contention that the district court improperly extended the judgment to include Monts as a defendant is frivolous. The government sued both TDC and Monts as named defendants. *TDC I*, 24 F.3d at 294. In granting the government's motion for summary judgment as to liability, the district court in its March 2000 memorandum opinion and order referred only to TDC and neglected to mention Monts by name. However, in its February 2001 memorandum opinion awarding damages, the district court referenced its March 2000 memorandum and order on liability as granting summary judgment "against defendants TDC Management Corporation ("TDC") and T. Conrad Monts." Further, in granting the government's cross-motion in response to TDC's Rule 60 motion, the district court stated that the final judgment applied to both TDC and Monts, "each of whom shall be jointly and severally liability to the United States."

Accordingly, we affirm the grant of summary judgment to the government.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5150 September Term, 2001
89cv01533

United States of America, Filed on: July 5, 2002

Appellee

v.

TDC Management Corporation, Inc. and T. Conrad Monts,

Appellants

BEFORE: Ginsburg, Chief Judge, and Rogers and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 17, 2002, it is **ORDERED**, that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: S/Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5150 September Term, 2001
89cv01533

United States of America, Filed on: July 5, 2002

Appellee

v.

TDC Management Corporation, Inc. and T. Conrad Monts,

Appellants

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph,* Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED, that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: S/Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

TDC MANAGEMENT CORPORATION, INC.
and T. CONRAD MONTS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

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U.S. v. TDC Management Corporation, et.al.,
Civ. No. 89-1533(JGP)
(D.D.C. 3/29/00)(Memorandum & Order) 1a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 89-1533 (JGP)

TDC MANAGEMENT CORPORATION &
T. CONRAD MONTS,

Defendants.

MEMORANDUM

This matter is before the Court on plaintiff's motion for summary judgment. Plaintiff, the United States of America, brings this action under the False Claims Act ("the Act"), 31 U.S.C. § 3729. For the reasons set forth below, plaintiff's motion for summary judgment is granted.

BACKGROUND

TDC Management Corporation ("TDC") and the Urban Mass Transportation Authority ("UMTA")[1] entered into contract DTUM60-83-C-72107 ("Contract I") which called for TDC to develop a model bonding program to aid minority business enterprises ("MBEs") in gaining adequate bonding.[2] The contract listed specific steps TDC was to take in developing the model bonding program.[3] The statement of work in Contract DTUM60-83-C-72207 ("Contract II"), entered into by TDC and UMTA for the implementation of the actual bonding program ("Program"), was based on the model bonding program produced under Contract I. Under the terms of the contract, TDC was to serve as Program Manager of the bonding program.[4]

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[1] Subsequent to the commencement of this action, UMTA was renamed the Federal Transit Administration.

[2] The bonding program in question was initiated to address the problem of insubstantial minority business participation in federally-funded mass transportation construction projects because of a lack of adequate bonding. UMTA is authorized to provide financial assistance for programs designed to increase minority participation in public transportation activities, and to assist minority businesses in obtaining surety bonding.

[3] See generally Opinion of the Department of Transportation Board of Contract Appeals ("DOTBCA Opinion") at ¶ 3 (attached to Plaintiff's Motion for Summary Judgment (filed Aug. 16, 1996))(describing Task V of the model bonding program).

[4] TDC's report on its model bonding program helped define the responsibilities it would eventually have as Program Manager. "The program manager (TDC) would have six functions: (1) to locate participants and to develop program format; (2) to coordinate the program to assure that all participants acted in accordance with their agreements; (3) to provide technical assistance to transit authorities; (4) to ensure that disadvantaged business enterprises were not unfairly utilized by any participant; (5) to act as ombudsman for UMTA; (6) to document the program. Expanding upon (4), the report notes that transit

The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit") has summarized the history of this dispute including details of TDC's performance of its contractual obligation, the eventual termination of the contract by UMTA, proceedings before the Department of Transportation Board of Contract Appeals ("DOTBCA" or "the Board"), proceedings in this Court and the appeal of this Court's previous granting of summary judgment to TDC.

> Pursuant to its contract with UMTA, TDC submitted monthly progress and expenditure reports to UMTA. UMTA reimbursed TDC monthly for documented expenditures. The government claims that TDC's reports overstated its progress in attracting investors and failed to disclose that, contrary to the Program design, TDC sought to obtain a financial interest in Program operations. The government claims that UMTA would not have made payments to TDC had it been aware of either of these facts.
>
> UMTA first learned of TDC's alleged misrepresentations in December 1984. On April 5, 1985, it issued a termination for convenience. UMTA had, to that point, paid TDC $747,944 for contract-related expenditures. On June 1, 1985, TDC

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authorities might have larger opportunities which would require the investor to assume a greater role to the detriment of the participating disadvantaged business enterprise, and therefore the program manager would have to be wary to assure that the disadvantaged business enterprise was not unfairly treated. Expanding upon (5), the report noted that an ombudsman, defined as 'an objective person who investigates complaints,' would serve as a mediator among participants to assure resolution of controversies which might develop. 'It is most critical to the success of the demonstration program that the program manager have ombudsman ability .... The program manager should not have any financial risk.'" DOTBCA Opinion at ¶ 8(f).

submitted a termination settlement proposal seeking an additional $216,133 in contract reimbursements. In May 1986, a UMTA contracting officer held that only $486,944 of the total $928,916 claimed by TDC over the life of the contract were "allowable, allocable, and reasonable." The officer categorically disallowed TDC's undocumented travel costs, computer costs, excessive per diem charges, cost overruns, and costs associated with TDC's Los Angeles office. The officer requested that TDC reimburse UMTA for the $261,615 overpayment that TDC had already received.

TDC appealed the contracting officer's decision to DOTBCA, claiming that it was entitled to an additional $143,852 in cost-reimbursements from UMTA plus $9,830 in termination costs. UMTA raised three affirmative defenses to TDC's claims: (1) TDC failed to perform the tasks in the contract statement of work; (2) TDC obtained the contract "by fraud and misrepresentation"; and (3) TDC "perpetrated frauds ... in presenting vouchers for payment of costs claimed" under the contract. UMTA also filed a counterclaim, grounded in restitution and breach of contract, seeking recovery of all contract payments already made to TDC.

Pursuant to the Contract Dispute Act of 1978, 41 U.S.C. § 605, the Board held that its jurisdiction extended only to those costs that the contracting officer had disallowed. As such, the Board would not consider UMTA's claim that TDC was not entitled to any monies under the contract. Nonetheless, the Board would consider "any applicable reason for disallowance [of costs the contracting officer denied] regardless of whether or not such reason was stated in the Contracting Officer's decision."

On October 15, 1987, the government moved to suspend DOTBCA's contract dispute proceeding pending conclusion of a Department of Justice criminal investigation into possible fraud charges against TDC. DOTBCA granted this motion and stayed its proceedings until February 1, 1988. The government ultimately declined to file criminal fraud charges against TDC but, on May 26, 1989, it filed a civil action under the False Claims Act and the common law alleging that TDC knowingly submitted false progress reports to UMTA. The government claimed that TDC's monthly progress reports misrepresented its actual progress in attracting investors and sureties willing to participate in the Demonstration Bonding Program and concealed TDC's substantial deviations from agreed-upon Program terms.

Claiming that DOTBCA lacked jurisdiction to hear cases involving issues of fraud, the government moved to suspend the Board's contract dispute proceedings until the conclusion of the government's civil suit against TDC. The Board recognized that its jurisdiction, as defined by the Contract Dispute Act of 1978, did not extend to "settl[ing], compromis[ing], pay[ing] or otherwise adjust[ing] any claim involving fraud." 41 U.S.C. § 605(a). Nonetheless, the Board denied the government's motion and announced that it would "proceed in accordance with its statutory jurisdiction, to ascertain the amounts of costs incurred which were allocable to [the] contract and were reasonable." The Board recognized that this determination "may well have collateral effect beyond the categories of costs addressed in the Contracting Officer's decision." Nonetheless, the Board assumed that the district court

would "proceed in accordance with its statutory jurisdiction to ascertain whether TDC willfully submitted false progress reports."

After an administrative trial, the Board invalidated UMTA's categorical cost disallowances of TDC's reimbursement claims finding that TDC's monthly progress reports had notified UMTA of the very categories and types of expenditures that UMTA later sought to disallow. In addition, the Board held that TDC had not breached its contract through nondelivery of the end product. The United States Court of Appeals for the Federal Circuit affirmed the Board's ruling. Skinner v. TDC Management Corp., 975 F.2d 869 (Fed. Cir. 1992). Based on the collateral estoppel effect of the Board's decision, TDC moved for summary judgment in the government's False Claims Act ease against TDC. The district court granted TDC's motion and [an] appeal followed.

United States v. TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. 286, 288-89, 24 F.3d 292, 294-95 (1994).

In its review of this Court's grant of summary judgment to TDC, the D.C. Circuit affirmed in part and reversed in part this Court's determinations as to the collateral effect of the DOTBCA proceedings on the government's False Claims Act claims, and modified the standard set out by this Court for articulating a claim under the Act. As to the collateral effect of the DOTBCA proceedings, the D.C. Circuit affirmed this Court's grant of summary judgment to TDC with regards to the breach of contract (by allegedly overstating its progress) claim DOTBCA reviewed. Collateral estoppel applied "[b]ecause the Board implicitly found that TDC's monthly reports

accurately reflected TDC's Program progress." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 290, 24 F.3d at 296.

However, the D.C. Circuit reversed in part, stating that "DOTBCA's determination that UMTA tacitly assented to the activities and expenditures *contained* in TDC's monthly reports does not collaterally estop the government from bringing a False Claims Act claim based on information TDC *omitted* from those reports." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 290, 24 F.3d at 296 (original emphasis). Thus, while collateral estoppel prevented the government from bringing a False Claims Act claim based on false information contained in the progress reports, the government could bring such a claim based on material information TDC failed to include in those reports, such as TDC's alleged attempts to gain a financial interest in Program operations.

As for the standard this Court is to use in evaluating the government's False Claims Act claim against TDC, the D.C. Circuit, in relevant part, held that

> [t]o prevail under the False Claims Act, the government must prove either that TDC actually knew it had omitted material information from its monthly progress reports or that it recklessly disregarded or deliberately ignored that possibility. The government need not prove that TDC intended to deceive the government by omitting such information.
>
> TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 292, 24 F.3d 292 at 298.

Finally, the D.C. Circuit concluded that the Act's civil penalty and treble damages provisions added in the 1986 amendment to the Act did not apply retroactively to the government's claim against TDC. Rather, "the civil penalty

and double damages provisions of 31 U.S.C. § 3729 (1982) govern any damage award that ensues from the government's False Claims Act suit against TDC. Any such damage awarded would merely offset the payments to which the Board of Contract Appeals has already determined TDC is entitled under the terms of its UMTA Contract." TDC Mgmt. Corp., Inc., 306 U.S. App. D.C. at 292, 24 F.3d 292 at 298.

The case was then remanded to this Court for resolution of the government's False Claims Act claim based on omissions from progress reports filed in support of TDC's payment requests, in accordance with the D.C. Circuit's opinion. Presently before the Court is the government's motion for summary judgment.

DISCUSSION

According to Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

A. Collateral Estoppel Effect of Factual Findings Made by DOTBCA

In order for the government to prevail, it must first show that there are no genuine issues of material fact. The government's answer to this burden is that none of the material facts important to its False Claims Act claim are at issue because DOTBCA has already issued findings of fact which are binding on this Court. See Plaintiff's Motion for Summary Judgment at 3-5. The government points to several instances identified by DOTBCA of factual

omissions from the progress reports filed by TDC, along with DOTBCA's conclusion that those omissions were intentionally designed to avoid a rebuke from UMTA. As the government notes, collateral estoppel prevents this Court from revisiting factual determinations made by DOTBCA. See Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1995)("Under the doctrine of collateral estoppel, ... a judgment ['on the merits'] precluded relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.").

In its opposition to the government's motion for summary judg nent, TDC fails to address, let alone dispute, the collateral estoppel effect of the DOTBCA opinion with regards to omissions from its monthly reports to UMTA. Instead, TDC suggests that the False Claims Act claim based on omissions is a new claim which requires further discovery. The Court cannot agree with TDC's assessment. As the government points out in its reply, the complaint is replete with references to omitted information. See Plaintiff's Reply to Opposition of Defendants to Plaintiff's Motion for Summary Judgment ("Plaintiff Reply")(filed Dec. 31, 1996) at 3-4. Furthermore, the very remand from the D.C. Circuit to this Court was based on the omission-oriented False Claims Act claims filed by the government. Finally, the issue of omissions was squarely addressed by the Board in its prior review of the contract termination.

The Court concludes that collateral estoppel prevents TDC from relitigating factual issues settled by the Board with regards to omissions. Before evaluating whether these factual findings are sufficient to support the government's False Claims Act claim, the Court will summarize the Board's findings regarding instances of TDC's failure to disclose material information to UMTA.

1. Dealings with Equitable Life Assurance Society

TDC's dealings with Equitable Life Assurance Society ("Equitable"), another potential investor in the Program, further highlight instances in which TDC omitted material information from its reports to UMTA. On December 12, 1983, TDC sent a formal proposal to Equitable soliciting its participation in the Program. TDC failed to furnish UMTA with a copy of this proposal when it made progress reports on the negotiations with Equitable.[5] See DOTBCA Opinion at ¶ 64. Inter alia, the proposal recommended:

(1) Creation of a loss reserve of $6,000,000 by equal contributions from "UMTA and a private investor(s)"[sic], upon which a surety would make available a bonding line of credit of $60,000,000.

(2) The loss reserve would become the capital of a new corporation, which at the time the surety issued bonds would itself issue a letter of credit to the surety in an amount equal to 10% of the bond face value.

(3) The new corporation would itself join venture with disadvantaged business enterprises to perform the construction, taking a maximum of 49% of the profits.

(4) UMTA would not share in any profits of the corporation.

(5) TDC would be "most happy" to serve Equitable by providing management

[5] The first progress report submitted by TDC after the December 12, 1983 proposal to Equitable was dated January 4, 1984. DOTBCA Opinion at ¶ 122.

> assistance to the disadvantaged business enterprises.

DOTBCA Opinion at ¶ 64.

As the Board specifically concluded, the "use of the UMTA contribution as capital for a new corporation was contrary to the change in the Demonstration Bonding Program made at UMTA's instance." Id. Furthermore, TDC made a more formal proposal to Equitable on July 26, 1984, which added terms calling for the $6,000,000 in the bonding security pool to be invested in interest-accruing accounts, and allowing the investment entity to earn a 3% construction management fee. See DOTBCA Opinion at ¶ 65. DOTBCA noted that "nowhere in the Demonstration Bonding Program was there any indication that the investor or any other participant could earn construction management fees. Id. TDC and Equitable did not reach final agreement on participation, and it was "not until long after the termination that UMTA obtained a copy [of TDC's proposal] from Equitable." Id.

It should also be noted that TDC's offer to provide management assistance to the Program participants conflicted with its duties as Program Manager. As the Board noted, "participating disadvantaged business enterprises would require technical assistance, but this would not come from the program manager." DOTBCA Opinion at ¶ 13(f). TDC withheld from UMTA information about its intentions to provide management assistance to Program participants. The Board noted potential motivation omitting information about his deviation from the Program specifications.

> The Demonstration Bonding Program called for management assistance to be provided to participating disadvantaged business enterprises, primarily by the investor with possibly some

> assistance by the surety, but certainly for none to be provided by the Project Manager (TDC). (Finding 13). Nowhere did the Program call for the provision of such assistance to be funded, directly or indirectly, by UMTA. Thus, to the extent that TDC was planning on utilizing the interest generated by short-term investment of the UMTA contribution to underwrite costs of providing such assistance, it was departing from the terms of the Demonstration Bonding Program.
>
> In addition, TDC was proposing to investors that the disadvantaged business enterprises be charged a 3% fee for management services. (See Finding 65). To the extent that TDC was planning to charge disadvantaged business enterprises in order to underwrite the costs of providing this management assistance, it was also departing from the Demonstration Bonding Program, as well as seeking to obtain profits for itself.

DOTBCA Opinion at 108-09.

2. Dealings with New York Life Insurance Company

As previously stated, Contract II required TDC to act as ombudsman for UMTA in administration of the Program. DOTBCA Opinion at ¶ 8(f). The government points to several instances in the record which indicate that TDC fully understood that its role as Program Manager included the responsibility of acting as ombudsman for the various program participants, and that in order for it to effectively execute its ombudsman duties, it would have to avoid any conflicts of interest, including having any financial stake in Program operations. See DOTBCA Opinion at ¶¶ 8(f), 29(k), 79(b); see also DOTBCA Opinion at 125-26.

In its opinion, DOTBCA repeatedly chastised TDC for failing to disclose to UMTA its plans to hold a financial stake in Program operations. DOTBCA highlighted TDC's dealings with New York Life Insurance Company ("New York Life") as an example of this deficiency. In 1984 TDC began approaching several insurance companies, including New York Life, to solicit participation in the Program. DOTBCA found that "at some point prior to October, 1984, TDC was aware that New York Life wished TDC to have a financial interest in the Program. At this juncture, TDC should have made mention of this in a periodic progress report [to UMTA]." DOTBCA Opinion at 126.

Not only did TDC fail to notify UMTA that New York Life preferred TDC to have a financial stake in the Program, TDC went on to propose such an arrangement to New York Life through its director and officer T. Conrad Monts. As DOTBCA found, TDC sent New York Life a "Draft Deal Memorandum" which stated that "investment will total Three Million Dollars ($3,000,000) contributed 90% by New York Life Insurance Company and other investors (the insurance companies) and 10% by TDC Management Corporation." DOTBCA Opinion at ¶ 68. DOTBCA noted that each participant's investment would be a combination of debt and equity, with each investor receiving stock in return for its investment.[6] This arrangement contradicted the requirements of both the Program and the contract. See DOTBCA Opinion at ¶ 13(h).

In its report to UMTA regarding interactions with New York Life, TDC failed to mention anything regarding its plans to invest in the Program. As the Board found, TDC described its negotiations with New York Life in detail in its October 1984 report, but "did not furnish to UMTA a copy

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[6] For a more detailed explanation of the investment plan, including stock distributions, see DOTBCA Opinion at ¶¶ 68-69.

of the private placement memorandum, which would have revealed that TDC was to have an equity interest in the Demonstration Bonding Program." DOTBCA Opinion at ¶ 82(d). The Board concluded:

> "[g]iven its recognition of the need to avoid organizational conflicts of interest, one is compelled to conclude that [TDC's] silence was intentional, to avoid a direction from UMTA that it not participate. Given TDC's repeated statements in divers submittals of the program manager's monitoring function, one can only conclude that TDC's silence in not informing UMTA of New York Life's wishes in the matter was either intentional or was at best grossly negligent. In either event, the result is the same.
>
> Under the Demonstration Bonding Program as drafted by TDC and as embodied in [Contract II], for TDC to simultaneously hold positions as program manager and (partial) investor would be to place it in a position where it could not objectively carry out its functions as program manager. It could not objectively monitor the relationship between investor (itself) and disadvantaged business enterprise; it would be a judge in its own cause. This would be a classic organizational conflict of interest.

DOBTCA Opinion at 126.[7]

3. Transit Sureties, Inc.

At some point during its implementation of the Program, TDC determined to form Transit Sureties, Inc. ("Transit Sureties"), a distinct corporate entity to engage in joint ventures with the disadvantaged business enterprises, in order to shield UMTA and other private investors from liability. DOTBCA previously concluded that using a separate corporation to joint venture with the disadvantaged business enterprise did not depart from the terms of the Program. The Board concluded that such an arrangement was "the most legally logical vehicle for investor participation to assure adequate insulation from liability. Nothing in the Demonstration Bonding Program precluded the incorporation of Transit Securities, Inc." DOTBCA Opinion at 111.

Although the terms of the Program were not violated by the incorporation of Transit Sureties, the Board noted that problems arose with how TDC chose to finance and organize the new corporation. For example, the Board specifically found that

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[7] An additional summary of the various omissions made in report to UMTA regarding negotiations with potential investors, including Equitable and New York Life, can be found in the DOTBCA Opinion. The summary includes omissions regarding TDC's role as an investor. TDC's use of UMTA's financial contribution as capital for its new corporation (Transit Sureties, Inc.), UMTA's legal relationship with investors through the new corporation, and TDC's plans to provide technical assistance to the disadvantaged business enterprises. See DOTBCA Opinion at ¶ 79. The Court also notes that the record from the Board is clear that TDC was not particularly forthcoming in providing UMTA with copies of the proposals made to New York Life and Equitable. See DOTBCA Opinion at ¶¶ 65, 82(d).

UMTA did not want its [$3,000,000] contribution [to the Program] used as capital for [the] corporation. In comments on TDC's proposed Demonstration Bonding Program under the first contract, UMTA had made this clear, and that the contribution was to be used only as a reserve. (Finding 11(d) and (f)). Nevertheless, TDC proposed to Equitable Life Assurance Society, a potential investor, that UMTA's contribution would become part of the capital of Transit Sureties, Inc. (Finding 64).

As noted in Findings 67-69, TDC was structuring Transit Sureties, Inc. in such a manner that 90% of the $3,000,000 private investment would be in the form of a loan to the corporation rather than a contribution to equity capital. One effect would be to guarantee the private investor a gross return of 13-$^1/_2$% on its investment, since payment of interest owed would be one of Transit Sureties, Inc.'s primary obligations. Only if there were a complete failure of the Program, with massive defaults, would the investors lose their principal. As the Board views the contemplated transaction the result would be that through the use of

> UMTA's contribution and a loan from the investors, TDC would eventually own Transit Sureties. The corporate structure of Transit Sureties, Inc. is not consistent with the purpose and structure of the Demonstration Bonding Program.

DOTBCA Opinion at 111-12.

Furthermore, the Board was plainly critical of TDC's intended relationship with the new corporation. As the Board noted,

> TDC went further, organizing Transit Sureties, Inc. in such a manner as to assure that TDC would eventually control that corporation (Findings 67 and 68), by then expected to be profitable, and arranging to charge the disadvantaged business enterprises a 3% management fee. If this plan had carried through to fruition, then no longer could TDC act objectively in performing its ombudsman/program manager functions and no longer could TDC objectively perform its Task X (Finding 48) functions of ensuring that all participants were acting properly and that participating disadvantaged business enterprises were not being unfairly treated.
>
> Upon reviewing all the contemporaneous documents

> in the record, the Board concludes that this omission of information from the reports (to UMTA) was intentional.

DOTBCA Opinion at 24.

4. Omissions Regarding General Management of the Program

TDC's dealings with New York Life, Equitable and Transit Sureties clearly demonstrate a pattern of omitting from progress reports information which would have revealed to UMTA that some of TDC's practices were variations from the intended Program. While concluding that the omissions were not legitimate grounds for UMTA to terminate the contract for convenience, the Board openly speculated about whether the omissions could constitute fraud. As the Board noted, none of the progress reports advised UMTA:

> (1) that TDC or Mr. Monts was to participate as an investor (Finding 66);
>
> (2) that TDC intended to use interest generated by the security pool to fund TDC furnishing technical assistance to the disadvantaged business enterprises, a function which in the Program was to be performed by the sureties or the investors;
>
> (3) that TDC would provide management service to the disadvantaged business enterprises (Finding 64);
>
> (4) that disadvantaged business enterprises would be charged a 3% management fee (Finding 65);
>
> (5) that UMTA's contribution would be used as part of capitalization of Transit Sureties, Inc., despite the direct statement to the contrary in the Report on

> Subtasks C, D, and E developed under the earlier contract (Finding 7);
>
> (6) that the stock structure of Transit Sureties, Inc. was intended to allow TDC to eventually emerge in control of the company (Findings 68 and 69).
>
> Significantly, most of these omissions were variations which could or would result in an enhanced or newly created opportunity for TDC or Mr. Monts to derive profits from the Demonstration Bonding Program. Reviewing all the contemporaneous documents inescapably leads to the conclusion that these omissions were intentional omissions, intended to keep UMTA from learning of activities which UMTA would insist be terminated.

DOTBCA Opinion at 130.

B. The Government's False Claims Act Claims

To establish a claim under the False Claims Act, the government must establish that TDC "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729. To establish the knowledge element, the D.C. Circuit has held that the government must show that the material omissions were either intentional or resulted from reckless disregard. Furthermore, the government need not establish that TDC actually intended to deceive the government by omitting the pertinent information.

Considering the factual determinations made by the Board, the Court is able to conclude that the government has established that the omissions were either intentional or resulted from reckless disregard. As the Board itself noted, at least one of TDC's omissions was calculated to avoid a

directive from UMTA to cease activities which would have given TDC a financial stake in Program operations. See DOTBCA Opinion at 130. In any event, omissions relating to the plethora of variations from the Program discussed above clearly resulted form TDC's reckless disregard of UMTA's interest in keeping abreast of all material Program developments, particularly those relating to the Program Manager's ability to carry out its role according to the terms of the contract. The omissions clearly had the effect of leading UMTA to conclude that the Program was making progress in accordance with established guidelines. The omissions thus made the progress reports in question false. Since the progress reports were offered by TDC in support of invoices for payment under the contract, the government has met its burden of proof to establish its False Claims Act claim.

The parties argue over whether the omissions were actually material, meaning that UMTA would not have continued payments to TDC but for its ignorance of the omitted information. The government points out that the False Claims Act does not "expressly require the United States to prove that a claim is false in a 'material' respect." Plaintiff's Motion for Summary Judgment at 22. However, TDC replies to this by pointing out that the D.C. Circuit required that

> [to] prevail under the False Claims Act, the government must prove that either TDC actually knew it had omitted material information from its monthly progress reports or that it recklessly disregarded or deliberately ignored that possibility.

TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298 (emphasis added).

Regardless of whether the materiality of the omissions is a required element of the government's case, the Court concludes that the omissions were indeed material, meaning that had UMTA known about the omitted information, it would have either required TDC to terminate certain activities or terminated the contract for cause. This conclusion is supported not only by the DOTBCA Opinion,[8] but by the affidavits submitted by the government in support of its motion for summary judgment as well, which the Court is free to consider pursuant to Federal Rule of Civil Procedure 56(c). See, e.g., Declaration of Ralph L. Stanley in Support of Plaintiff's Motion for Summary Judgment ("Stanley Decl.") at ¶¶ 3-6 ("If I had known that TDC, or Monts, had tried to obtain an equity interest or other financial interest in the demonstration bonding program without notification to UMTA, I would have directed that the contract be immediately terminated for cause."[9]

C. Damages

Having found that TDC is liable under the False Claims Act for the omissions in its progress reports to UMTA, beginning with the progress report dated January 4, 1984, pertaining to TDC's dealings with Equitable, the Court now turns to the issue of damages. As the D.C. Circuit held, this Court is to use the damages formula set out in 31 U.S.C. § 3729 (1982). See TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298. That section provides that damages for a violation of the False Claims Act can include a civil penalty of $2,000 per false claim, an amount equal to 2 times the amount of damages the Government sustains because of the false claim, and costs of the civil action.

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[8] See DOTBCA Opinion at 108-09, 124, 130.

[9] Ralph L. Stanley served as Administrator of the Urban Mass Transit Administration from November 21, 1983 to May 31, 1987. Stanley Decl. at ¶ 1.

Finally, the Court notes, as did the D.C. Circuit, that any damages awarded to the government from this suit shall offset damages owed to TDC by the government pursuant to DOTBCA's review of the contract termination. See TDC Mgmt. Corp. Inc., 306 U.S. App. D.C. at 292, 24 F.3d at 298.

Before issuing a final order on the issue of damages, the Court requires more specific information from the parties regarding the calculation of damages. Therefore, the United States shall have until June , 2000, to provide the Court with a detailed calculation of the damages, penalties, interest, and costs it is entitled to. This calculation should also specify the amount owed to TDC under the terms of the DOTBCA Opinion. TDC shall then have until June 30, 2000, to file a response to the government's proposed calculation of damages. The government shall then have until July 14, 2000, to file an appropriate reply. Notwithstanding the establishment of this briefing schedule with regards to the issue of damages, the Court encourages the United States and TDC to attempt to settle the issue of damages.

CONCLUSION

For the reasons contained in this memorandum, plaintiff's motion for summary judgment is granted as to TDC's liability under the False Claims Act. An appropriate order accompanies this memorandum.

Date: March 29, 2000

S/J. Penn U.S. District Judge

JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v. Civil Action No. 89-1533 (JGP)

TDC MANAGEMENT CORPORATION &
T. CONRAD MONTS,

Defendants.

ORDER

This matter is before the Court on plaintiff's motion for summary judgment. For the reasons set forth in the accompanying Memorandum, it is hereby

ORDERED that plaintiff's motion for summary judgment [#140] is granted as to TDC's liability; and it is further

ORDERED that the United States shall have until June 1, 2000, to provide the Court with a detailed calculation of the damages, penalties, interest, and costs it is entitled to, which should also specify the amount owed to TDC pursuant to the March 5, 1991 judgment of the Department of Transportation Board of Contract Appeals; and it is further

ORDERED that TDC shall then have until June 30, 2000, to file a response to the government's proposed calculation of damages, and it is further

ORDERED that the government shall then have until July 14, 2000, to file an appropriate reply.

Date: March 29, 2000

S/J. Penn U.S. District Judge

JOHN GARRETT PENN
United States District Judge